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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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JESSE RAMIREZ,

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Petitioner,

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v.

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PAUL THOMPSON,

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Respondent.

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Case No. 2:21-cv-01837-WBS-JDP (HC)

FINDINGS AND RECOMMENDATIONS  
THAT RESPONDENT'S MOTION TO  
DISMISS BE GRANTED

OBJECTIONS DUE IN FOURTEEN DAYS

ECF No. 6

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Petitioner Jesse Ramirez, a federal prisoner without counsel, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. ECF No. 1. He argues that he has accrued 976 days of earned time credits toward early release under the First Step Act of 2018 (“FSA”) and that he is therefore entitled to an updated release date of June 9, 2026. *Id.* at 1. Respondent has filed a motion to dismiss, ECF No. 6, arguing that petitioner’s claims are not yet ripe and, in the alternative, that he has failed to exhaust his administrative remedies. Petitioner has filed an opposition, ECF No. 9, and respondent has declined to file a reply. I find that petitioner did not exhaust his administrative remedies before filing this petition and recommend that respondent’s motion be granted on that basis. In so doing, I find it unnecessary to reach respondent’s other arguments.

No habeas rule specifically applies to motions to dismiss. See *Hillery v. Pulley*, 533 F. Supp. 1189, 1194 (E.D. Cal. 1982) (“Motion practice in habeas corpus is not specifically provided for in the rules but must be inferred from their structure and the Advisory Committee

1 Notes.”). The Ninth Circuit construes a motion to dismiss a habeas petition as a request for the  
2 court to dismiss under Rule 4 of the Rules Governing § 2254 Cases, however. *See O'Bremski v.*  
3 *Maass*, 915 F.2d 418, 420 (9th Cir. 1991). Under Rule 4, I evaluate whether it “plainly appears”  
4 that the petitioner is not entitled to relief and, if so, recommend dismissal of the petition.  
5 Petitioner admits that he did not exhaust the administrative remedies offered by the Bureau of  
6 Prisons (“BOP”) before filing this lawsuit., ECF No. 1 at 1, but he argues that exhaustion of  
7 remedies is not required because the petition presents a “narrow dispute of statutory  
8 construction.” In his view, the Ninth Circuit’s decision in *Fraley v. United States Bureau of*  
9 *Prisons*, 1 F.3d 924 (9th Cir. 1993), supports his position. In *Fraley*, the prisoner submitted an  
10 initial “request for administrative remedy” to the BOP. *Id.* at 925. That request was denied at the  
11 first level with a citation to official BOP policy. *Id.* Although the prisoner did not escalate her  
12 administrative action to the regional level, the Ninth Circuit excused that failure, stating: “because  
13 the Regional Director would almost certainly have denied her request as well, citing the same  
14 official Bureau of Prisons policy, we agree with the district court’s conclusion that any further  
15 application for administrative remedies would be futile.” *Id.*

16 Petitioner’s argument is appealing at first blush, but several important distinctions  
17 convince me that it is misplaced. First, unlike the prisoner in *Fraley*, petitioner does not allege  
18 that he received a first-level response that was unlikely to be successfully appealed. Second, even  
19 if he had so alleged, BOP’s FSA procedures had not yet been finalized; BOP had not rendered a  
20 final decision about how earned time credit should be considered under the FSA. ECF No. 6 at 5.  
21 Thus, petitioner could not have been certain, as the prisoner in *Fraley* was, that set policy stood  
22 against his request. Finally, in a more recent decision, the Ninth Circuit declined to excuse  
23 exhaustion where a prisoner argued that the BOP had exceeded its statutory authority under the  
24 FSA. *See Ahmad v. Jacquez*, 860 F. App’x 459, 462-63 (9th Cir. 2021). Other courts in this  
25 circuit have reached the same conclusion. *See, e.g., Mitchell v. Ponce*, No. 2:21-03315 ADS,  
26 2022 U.S. Dist. LEXIS 29706, \*10 (C.D. Cal. Feb. 7, 2022); *Butler v. Bradley*, No. CV 20-11211  
27 DMG (RAO), 2021 U.S. Dist. LEXIS 49760, \*6 (C.D. Cal. Feb. 22, 2021) (rejecting futility of  
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1 exhaustion argument, but reaching the merits based on petitioner's argument that prison officials  
2 refused to provide him with grievance forms).

3 For the foregoing reasons, I RECOMMEND that respondent's motion to dismiss, ECF  
4 No. 6, be GRANTED and the petition be dismissed without prejudice.

5 These findings and recommendations are submitted to the U.S. district judge presiding  
6 over the case under 28 U.S.C. § 636(b)(1)(B) and Local Rule 304. Within fourteen days of the  
7 service of the findings and recommendations, the parties may file written objections to the  
8 findings and recommendations with the court and serve a copy on all parties. That document  
9 must be captioned "Objections to Magistrate Judge's Findings and Recommendations." The  
10 presiding district judge will then review the findings and recommendations under 28 U.S.C.  
11 § 636(b)(1)(C).

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13 IT IS SO ORDERED.

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15 Dated: April 12, 2022

  
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JEREMY D. PETERSON  
UNITED STATES MAGISTRATE JUDGE

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